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URMINDER AULAKH
OF COUNSEL

July 7, 2006

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

**Re: MB Docket No. 03-15
Request for Waiver of Replication/Maximization
Interference Protection Deadline
Pollack/Belz Broadcasting Company, LLC
Television Station KIEM-DT, Eureka, California (Facility ID#
53382)**

Dear Ms. Dortch:

Pollack/Belz Broadcasting Company, LLC ("PBBC"), by its counsel, hereby requests a waiver of the so-called "use it or lose it" deadline, currently July 7, 2006 (the "Deadline"), to complete construction of replicated or maximized DTV facilities for television station KIEM-DT at Eureka, California. In a Public Notice, DA 06-1255, released June 14, 2006 (the "*June 14 Notice*"), the Commission specified procedures for the submission of requests for waiver of the Deadline. The *June 14 Notice* requires that a licensee seeking a waiver should "demonstrate severe financial constraints or circumstances beyond its control." It indicates that waivers "may be granted on a six-month basis if good cause is shown." *Id.* at 5.

In *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), the Court articulated the familiar standard for a waiver request. The Court explained that waiver, in appropriate cases, allows the agency to take into account certain factors that will produce a "*more effective implementation of overall policy* on an individualized basis." *Id.* at 11 (emphasis added). Waiver is warranted when deviating from the general rule "will better serve the public interest." However, in order for the Commission to act on a clear sense of the public interest, it is critical that the regulatory context of the matter be made explicit.

I. THE REGULATORY BACKGROUND OF THE DTV TRANSITION INFORMS THE MEANING OF THE ‘PUBLIC INTEREST’ FOR PURPOSES OF EVALUATING THIS WAIVER REQUEST.

The FCC’s overriding goal throughout the DTV proceedings has been “to promote broadcasters’ ability to build digital businesses so that their valuable free programming service will continue.” *Advanced Television Systems and Their Impact Upon Existing Television Broadcast Service* (Fifth Report and Order), 12 FCC Rcd 12809 (1997) at ¶ 60 (“*Fifth Report & Order*”). Because of the severe “logistical and resource issues” that broadcasters confront – including “the construction and modification of television towers” and “the cost of conversion of station facilities,” the Commission resolved to give operators “maximum flexibility in developing viable business plans during the transition period.” *Service Rules for the 746-764 and 776-794 MHz Bands* (First Report and Order), 15 FCC Rcd 476 (2000), at ¶ 143 (citing *Fifth Report & Order, supra*).

The FCC has been forthright in acknowledging instances in which its DTV decisions have had effects that ran contrary to the goal of facilitating broadcasters’ build-out efforts, and therefore required correction. For example, the Commission has candidly observed that “some of the requirements we adopted . . . may be having the unintended consequence of hindering, rather than furthering, the DTV transition, . . . may be imposing substantial burdens on broadcasters without substantial countervailing public benefits, and may in fact be contributing to difficulties faced by a substantial number of stations in meeting their DTV construction deadlines.” *Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television (Memorandum Opinion and Order On Reconsideration)*, 16 FCC Rcd 20594 (2001), at ¶ 6 (hereafter, “*2001 Reconsideration Order*”). This circumspect approach is well suited to the uncharted regulatory territory represented by the still-novel world of digital television.

Accordingly, a linchpin of the FCC’s DTV philosophy has been to allow a station to extend its DTV build-out deadline when this is required by circumstances that the broadcaster could not have foreseen or that have been beyond the station’s control. *Fifth Report and Order*, 12 FCC Rcd at 12841. Recognizing the need for flexibility, the Commission would “take into account problems encountered that are unique to DTV conversion” – for instance, the added financial burden that broadcasters will necessarily assume. *2001 Reconsideration Order* at ¶ 45.

The FCC's expertise likewise includes the numerous technical matters that have figured in the development of its DTV policies. For example, the view that "[o]ne of the most significant issues in converting to digital broadcasting is the construction of new towers or the upgrade of existing towers," *Fifth Report & Order, supra*, at ¶ 92, obviously derives from the Commission's technical knowledge of broadcast engineering, market-specific characteristics, and industry experience.

For these reasons, the FCC has been careful to ensure that the ramifications of its actions do not compromise the marketplace dynamics the agency is counting on to energize the efficient deployment of DTV. *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59) (Report and Order)*, 17 FCC Rcd 1022 (2002), n. 523 and authorities cited therein.

The foregoing review of the FCC's DTV policies demonstrates (1) that the FCC has significant expertise with respect to both the economic and technical aspects of DTV implementation, on the basis of which reliable, common sense conclusions can be drawn from basic facts in individual cases; and (2) that the public interest implications of the Commission's policies can vary greatly depending on individual broadcasters' circumstances. These premises are essential for the achievement fair and sensible judgments with respect to requests for waiver of the current deadline.

II. THE PUBLIC INTEREST WARRANTS WAIVER OF THE JULY 7 DEADLINE WITH RESPECT TO PBBC.

PBBC has indicated its preference to utilize its analog channel (Channel 3) for digital operations upon the completion of the digital transition. The FCC recently reiterated its previous determination that licensees in such circumstances would satisfy the "use it or lose it" deadline by constructing facilities capable of serving "at least 80 percent of the number of viewers served by the 1997 facility on which their replication coverage was based." *June 14 Notice* at 1-2, citing paragraph 78 of the *Second DTV Periodic Review Report and Order*. The *June 14 Notice* further illuminated the procedures for such licensees to notify the FCC that they have satisfied this 80 percent build-out threshold. *Id.* at 3. The licensee must apply for a permit to operate at the interim power level (one that falls somewhat short of a complete build out of its authorized facilities) and, once that permit has been granted, then file an application for a license to cover the modi-

fied permit. *Id.* A waiver request is necessary in order to maintain interference protection while the licensee awaits action on its application to modify the permit. *Id.* Moreover, the deadline is tolled while the FCC processes the waiver request. *Id.* at 4.

PBBC has an outstanding permit describing facilities that satisfy the FCC's 80 percent build-out threshold. *See* File No. BPCDT- 20060627ABD. Construction of the DTV facility contemplated in that application is nearly complete. Unfortunately, one item of equipment (an electronic module on the power amplifier) necessary for operation at the authorized power level proved to be defective. A replacement part is scheduled for delivery next week. Obviously, the unanticipated equipment defect was not within the licensee's control.

PBBC expects to begin operations meeting the 80 percent service threshold even before this waiver request is granted. It will file its application for a license to cover the modified permit promptly upon completion of construction. Thus, granting the instant request would therefore fulfill the Commission's intent in promoting sustainable progress toward the completion of the DTV transition, while serving the public interest in expediting the deployment of digital signals to a larger share of the population in the Eureka DMA.

III. CONCLUSION

The public interest will be disserved if strict enforcement of the DTV Deadline results in KIEM forfeiting or losing significant protection for its digital authorization. A forfeiture would only serve to make the overall transition to DTV in this small market more awkward than it is already.

In view of the foregoing, the regulatory burden that strict compliance with the existing DTV deadline would impose on PBBC is excessive under the circumstances, and should be moderated to allow PBBC to complete the transition in an orderly fashion. The confluence of factors described herein demonstrates that PBBC is substantially complying with the legislative and agency mandates to build out digital facilities quickly.

Accordingly, the grant of this request for waiver is warranted.

Respectfully submitted,

Marlene H. Dortch
July 7, 2006
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